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IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
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E. ROBERT SEAVER

No. 71-718

PAUL D. MCGINNIS, Commissioner of Corrections, State of New York; HARRY FRITZ, Warden, Auburn Prison, Auburn, New York; J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants-Appellants,

against

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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February 28, 1972

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the United States Supreme Court Rules, appellees move the Court to dismiss the appeal from a judgment and order of the United States District Court for the Southern District of New York on the ground that the questions on which the decision of the court depends do not present a substantial federal question.

In the alternative, appellees move the Court to affirm the aforementioned judgment and order on the ground that the questions on which the decision of the cause depends are quite limited in scope and have been thoroughly considered by the three-judge court, thereby requiring no further argument.

Statement

The facts comprising the basis of this appeal are correctly presented in the Attorney General's Jurisdictional Statement under the heading "Statement of the Case." The opinion convening a three-judge court and the opinion of the three-judge court are correctly set forth in Appendices "B", "D" and "E" to the Jurisdictional Statement of the Attorney General's brief.

I

The United States District Court for the Southern District of New York correctly held that Section 230(3) of the Correction Law is unconstitutional as it violates the Equal Protection Clause.

Section 230(3) of the New York Correction Law draws a distinction between the treatment of state prisoners incarcerated prior to sentencing and those who were not similarly incarcerated. Specifically the distinction is accomplished by that section's provision denying state prisoners good time credit for the period of their pre-sentence incarceration in a county jail.* This distinction is recognized

* If plaintiff Rutherford and plaintiff Royster were to receive good time credit for time spent in county jail between arrest and sentence, they will be entitled to appear before the Parole Board several months (over four months, in Royster's case; nearly three months in Rutherford's) earlier than they will under the computation required by §230(3).

in both the opinion of the three-judge court [Jurisdictional Statement, Appendix D, p. 10a] and the opinion convening the three-judge court and is readily conceded by the appellants. [Jurisdictional Statement, p. 7].

"Such a difference in treatment between persons sentenced to State prison for like terms of imprisonment smacks of discrimination on its face" [Jurisdictional Statement, Appendix D, p. 10a]. Section 230(3) quite obviously discriminates among individuals; consequently the only issue before the three-judge court was whether a rational basis existed for this distinction and whether the practice envisioned by the statute served a valid governmental objective. *Dandridge* v. *Williams*, 397 U.S. 471, 486 (1969).

The appellants did not challenge the existence of the aforementioned distinction, rather they submitted several justifications for it; the principal justification appearing in the Jurisdictional Statement. The suggested justification is two-pronged. Firstly, it is argued that State prisons differ from county jails with respect to "purpose, usage and availability of facilities" [Jurisdictional Statement, pp. 7-8]. That as it is desirable for uniform standards of evaluation and for suitable programs of activity to be followed for evaluation, only prisoners in state prisons, over which the state has jurisdiction, may be credited with good time. Secondly, the appellants argue that as the state authorities must make the admittingly sensitive decision as to when a prisoner should be released into society, that "the granting of good time leading to an earlier minimum release date should be based solely on the personal evaluation of a prisoner's conduct by state officials

while he is actually confined in their custody." [Jurisdictional Statement, pp. 10-11].

Appellants further contend that the three-judge court, in failing to accept its proffered justifications has completely ignored the equal protection standards set forth by this Court and instead has blatantly substituted its judgment for that of the New York Legislature [Jurisdictional Statement, pp. 7-12].

Appellees submit that this proposition is unsound and that it does not find support in the opinion of the three-judge court.

The District Court, correctly delineated its responsibility in this case by providing:

> " 'It is true that the Equal Protection Clause requires only that the State's action be rationally based and free from invidious discriminations.' *Dandridge* v. *Williams*, 397, U.S. 471, 487 (1969). Indeed even though a state's practice may be discriminatory and substantially harm those who are the subject of the discrimination, the practice may still be constitutionally permissible if it serves a valid governmental objective. Thus, for example, although the requirement of bail pending trial substantially discriminates against the indigent defendant, such a classification of 'jail versus bail' is constitutionally sanctioned by the Eighth Amendment as a reasonable means for insuring a defendant's appearance in court. See, e.g., *Morris* v. *Crumlish*, 239 F. Supp. 498 (E.D. Pa. 1965). Nevertheless, while laws may create such distinctions and classifications, they must be related to the purposes of the law itself, and artificial distinctions not so reasonably related will not be countenanced" [Jurisdictional Statement, Appendix D, pp. 10a-11a].

Having laid the groundwork for their determination, the three-judge court then conducted a careful examination of plaintiffs' suggested justifications. Such examination is necessitated by the procedure employed by other courts considering similar cases raising questions of equal protection. *Dandridge* v. *Williams, supra,* 397 U.S. at 482-487; *McGowan* v. *Maryland,* 366 U.S. 420 [1961]; *Briggs* v. *Kerrigan,* 431 F. 2d 967 [1st Cir. 1970]; *Boddie* v. *Wyman,* 434 F. 2d 1207 [2nd Cir. 1970]. As this Court stated in *Cohen* v. *Hurley* [366 U.S. 117 (1961), rehearing denied, 374, U.S. 857, rehearing denied, 379 U.S. 870:

> "Whatever procedures are fair, what state process is constitutionally due, what distinctions are consistent with equal protection all depend on the particular situation presented * * *."

After considering at length the facts before it, the three-judge court rejected the appellants' arguments as being unsubstantiated by the evidence [Jurisdictional Statement, Appendix D, pp. 11a-14a].

Initially, the suggested differences in purpose, usage and availability of facilities between state prisons and county jails* do not bear a reasonable relationship to the provisions of Section 230(3) and most assuredly do not

* In reference to the difference in "purpose, usage and availability of facilities" of these institutions, it is valuable to compare Section 230(3) with Section 250. Both sections provide for discretionary reduction of sentence for "efficient willing performance of the duties assigned him", even though the former section refers to state prisons while the latter refers to county jails. Also, see, Correction Law, §§246, 247, which direct that good time must be credited to the period of time a prisoner spends in any state institutions for mental defectives. In this situation, the superintendent or chief officer of the institution performs the acts normally vested in the Parole Board. It is apparent that the purpose and usage of a mental institution differ substantially from those of a state prison.

account for any permissible distinction between state prisoners serving identical terms of imprisonment merely because a prisoner underwent presentence incarceration. Instead, as the three-judge court determined, the "overriding consideration in the granting of good time reductions is the maintenance of prison discipline" [Jurisdictional Statement, Appendix D, p. 11a]. The same conclusion was reached by a New York State Court, even though upholding the constitutionality of Section 230(3) it found:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct."

Perez v. *Follette*, 58 Misc. 2d 319, 321 (Sup. Ct., Dutchess County, 1968); aff'd 31 A.D. 2d 600; motion for leave to appeal dismissed as moot, 23 N.Y. 2d 737, 296 N.Y.S. 2d 569 (1968). See, also, *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *Colin* v. *New York State Parole Board*, 13 A.D. 2d 555 (1961).

That good time is awarded for good conduct is demonstrated in other ways as well. As recognized by the three-judge court, a prisoner's maximum allowance for future good time is immediately credited at the time his minimum parole date is initially computed upon his arrival in State prison (see, Jurisdictional Statement, Appendix F, pp. 35a, 38a). "In effect, then, a prisoner does not 'earn' good time credit as time goes on for exemplary performance in assorted prison programs but rather simply avoids being penalized for bad behavior" [Jurisdictional State-

ment, Appendix D, p. 12a]. See, also, *Bitz* v. *Canavan*, 11 N.Y.S. 2d 991 [1939]; rev'd on other grounds 257 App. Div. 247; aff'd 281 N.Y. 699, 23 N.E. 2d 536. The State Legislature has itself declared that the prison "board", as described in Section 235,* shall have the discretion of withholding the good time allowance as:

> "a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in section two hundred and thirty, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment, as above provided." New York Correction Law, §235.

It must also be noted that the New York Legislature empowered the State to grant good time credit for presentence jail time in the case of prisoners sentenced to a county jail or a jail farm [Correction Law, §250] and in the case of the indeterminate sentence prisoner's statutory release date from state prison. [Correction Law, §230(4)]. See, also, *Royster* v. *McGinnis*, —— F. Supp. —— (S.D. N.Y., January 21, 1971). The applicability of these sections manifests the intention of the New York Legislature to provide for a uniform scheme of reduction for all classes of prisoners. Leg. Doc. 1935, 60 (I), p. 18; see, also, pp. 25-27, 51.

Lastly, the legislative intent was readily apparent with the repeal of Section 230(3) [repealed L. 1970, c. 476, §45,

* Section 235 was repealed as of the 60th day after May 8, 1970, but it continues to apply to prisoners sentenced on an offense committed prior to September 1, 1967, the effective date of the New Penal Law.

eff. on the 60th day after May 8, 1970] and the subsequent passage of Sections 803 and 805 of the Correction Law and Sections 70.30 and 70.40 of the Penal Law [added L. 1967, c. 680, §147, eff. September 1, 1967].* Under this new statutory scheme, good time earned on the minimum sentence is abolished, and presently all prisoners appear before the Parole Board at the expiration of their minimum term notwithstanding the amount of county jail time accumulated prior to sentencing or the amount of good time earned. Good time credit, including good time computed on the period of a prisoner's pre-sentence incarceration, is now deducted from an inmate's maximum term of imprisonment in determining his statutory release date [Defendants-Appellants' Memorandum of Law, pp. 13-14]. Because of these recent changes in the law, the discriminatory practices herein contested no longer exist with regard to prisoners sentenced on offenses committed after September 1, 1967.

Nor does the appellants' last argument, *i.e.*, that a prisoner's minimum release date must be based solely on the personal evaluation of a prisoner's conduct by the State Parole Board while he is actually confined in their custody [Jurisdictional Statement, pp. 10-11], require plenary consideration by this Court. Quite apparently the appellants' concern is that the Parole Board needs sufficient time in which to evaluate an inmate's conduct, and that any good time credit computed on the period of a prisoner's pre-sentence incarceration would jeopardize the efficient performance of the Parole Board's duties.

* The repeal of Section 230(3) limits the scope of this case as the contested law applies only to prisoners convicted of an offense committed prior to September 1, 1967, the effective date of the aforementioned enactments.

We submit that this argument is without merit as the amount of time available to the Parole Board would only be minimally reduced if good time credit were allowed for pre-sentence jail time [Jurisdictional Statement, Appendix E, p. 29a, see example therein]. Additionally, the Parole Board has the inherent power to refuse to release a prisoner if it is of the opinion that it has had insufficient time for evaluation. Correction Law §§212, 213; *Royster* v. *McGinnis, supra,* —— F. Supp. ——. [See, also, Jurisdictional Statement, Appendix D, p. 15a].

Other situations present themselves which reduce the amount of time in which the Parole Board may evaluate a prisoner's conduct, yet these apparently have not undermined the effectiveness of the Board. For instance, if a state prisoner is returned to a county jail in connection with court appearances on post-trial writs of *coram nobis* they are granted good time credit for such county jail time as well. Similarly, Sections 246, 247 and 66 of the Correction Law provide for the granting of good time credit for the period of time that a prisoner has been transferred to any reformatory, state institution for mental defectives, or work training program. Even though these examples present situations where inmates have been removed from the custody of the Parole Board, good time credit, nevertheless, continues to be granted during the prisoner's absence from State Prison.

Conclusion

For the foregoing reasons, it is respectfully submitted that the decision of the three-judge court should be affirmed or, in the alternative, that the appeal be dismissed.

Respectfully submitted,

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